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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON

ATLANTIC CASUALTY  
INSURANCE COMPANY, a North  
Carolina corporation,

Plaintiff,

vs.

BRAD BELLINGER, an individual, dba  
LILAC CITY VAPOR; LILAC CITY  
VAPOR, LLC, a Washington limited  
liability company; and MARLENE  
RUBERTT, an individual,

Defendants.

Cause No.

**COMPLAINT FOR  
DECLARATORY RELIEF**

Plaintiff Atlantic Casualty Insurance Company, for its complaint against defendants, alleges as follows:

COMPLAINT FOR DECLARATORY RELIEF – 1  
USDC ED WA CAUSE NO.

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ATTORNEYS AT LAW  
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(206) 624-1800/FAX (206) 624-3585

1                   **I. PARTIES AND JURISDICTION**

2       1.1 Plaintiff Atlantic Casualty Insurance Company (“Atlantic”) is a  
3 corporation duly organized under the laws of the state of North Carolina and has  
4 its principal place of business in Goldsboro, North Carolina. Atlantic is a surplus  
5 lines insurance company which transacts business in Washington.  
6

7       1.2 Upon information and belief, defendant Brad Bellinger conducted  
8 business as Lilac City Vapor, a sole proprietorship, in Spokane County at relevant  
9 times.

10      1.3 Upon information and belief, defendant Lilac City Vapor, LLC, was,  
11 at relevant times, a Washington limited liability corporation with its principal  
12 place of business in Spokane County.  
13

14      1.4 Upon information and belief, defendant Marlene Rubertt was at  
15 relevant times a resident of Spokane County, Washington.

16      1.5 This is an action for a declaratory judgment pursuant to USC § 2201,  
17 et seq., to determine an actual case or controversy between the parties.  
18

19      1.6 This court has jurisdiction pursuant to USC § 1332, et seq., because  
20 this matter involves citizens of different states and the amount in controversy  
21 exceeds \$75,000.00.  
22  
23

## II. FACTUAL ALLEGATIONS

2.1 Atlantic reasserts the allegations set forth in paragraphs 1.1-1.6 above as though fully set forth herein.

2.2 Atlantic issued commercial lines policy no. M179000250 to defendant Brad Bellinger dba Lilac City Vapor. The policy was in effect for a policy term of August 1, 2015 to August 1, 2016.

2.3 On or about October 13, 2016, defendant Marlene Rubert filed a civil damages lawsuit in the Spokane County, Washington, Superior Court against defendant Lilac City Vapor, LLC. Ms. Rubert's complaint alleges that, on January 30, 2016 while she was watching TV at her home, she sustained disfiguring injuries when an e-vapor cigarette device exploded in her mouth and face just as she was inhaling it. She alleges that she had purchased various e-cigarette products from Lilac City Vapor, LLC over the course of four years before the incident, and that her purchases included an Efest battery purchased on or around December 15, 2015, and a Tobeco Mod, a TrustFire charger, and an Arctic atomizer on other dates. The lawsuit alleges causes of action for products liability under Washington's Product Liability Act, RCW 7.72, *et seq.*, and for negligence. The lawsuit (hereafter, "liability lawsuit") is captioned Rubert v. Lilac City Vapor, LLC, and it is currently pending in the Spokane County Superior Court under cause no. 16-2-03995-7. A copy of the Complaint in the

**COMPLAINT FOR DECLARATORY RELIEF – 3  
USDC ED WA CAUSE NO.**

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1 liability lawsuit is attached hereto as Exhibit A and incorporated in its entirety by  
 2 this reference.

3       2.5 By letter dated October 21, 2016 from its attorney, Lilac City Vapor,  
 4 LLC tendered the liability lawsuit to Atlantic for defense. By letter dated  
 5 November 3, 2016, Atlantic agreed to provide a reservation of rights defense to  
 6 Lilac City Vapor, LLC with respect to the liability lawsuit.  
 7

### 8                   **III. CLAIM FOR RELIEF**

9       3.1 Atlantic reasserts the allegations set forth in paragraphs 1.1-2.5  
 10 above as though fully set forth herein.

11      3.2 Atlantic policy no. M179000250 provides liability coverage subject  
 12 to the following provisions found in Form CG00011001:

#### 14                   ***SECTION I – COVERAGES***

#### 15                   ***COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY***

##### 16      1. *Insuring Agreement*

- 17       a. *We will pay those sums that the insured becomes  
18 legally obligated to pay as damages because of  
19 "bodily injury" or "property damage" to which this  
20 insurance applies. We will have the right and duty  
21 to defend the insured against any "suit" seeking  
22 those damages. However, we will have no duty to  
23 defend the insured against any "suit" seeking  
damages for "bodily injury" or "property damage"  
to which this insurance does not apply. We may, at  
our discretion, investigate any "occurrence" and  
settle any claim or "suit" that may result. But:*

- 1                   (1) *The amount we will pay for damages is*  
2                   *limited as described in Section III – Limits*  
3                   *Of Insurance; and*
- 4                   (2) *Our right and duty to defend ends when we*  
5                   *have used up the applicable limit of*  
6                   *insurance in the payment of judgments or*  
7                   *settlements under Coverages A or B or*  
8                   *medical expenses under Coverage C.*

9                   *No other obligation or liability to pay sums or*  
10                  *perform acts or services is covered unless*  
11                  *explicitly provided for under Supplementary*  
12                  *Payments – Coverages A and B.*

- 13                  **b.** *This insurance applies to "bodily injury" and*  
14                  *"property damage" only if:*
- 15                   (1) *The "bodily injury" or "property damage" is*  
16                   *caused by an "occurrence" that takes place*  
17                   *in the "coverage territory";*
  - 18                   (2) *The "bodily injury" or "property damage"*  
19                   *occurs during the policy period; and*

20                   \* \* \*

## 21                  ***COVERAGE C MEDICAL PAYMENTS***

### 22                  ***1. Insuring Agreement***

- 23                  **a.** *We will pay medical expenses as described below*  
24                  *for "bodily injury" caused by an accident:*

- 25                   (1) *On premises you own or rent;*
- 26                   (2) *On ways next to premises you own or rent;*  
27                   *or*
- 28                   (3) *Because of your operations;*  
29                   *provided that:*

- 30                   (1) *The accident takes place in the "coverage*  
31                   *territory" and during the policy period;*

- (2) *The expenses are incurred and reported to us within one year of the date of the accident; and*
  - (3) *The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.*

b. *We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance. We will pay reasonable expenses for:*

  - (1) *First aid administered at the time of an accident;*
  - (2) *Necessary medical, surgical, x-ray and dental services, including prosthetic devices; and*
  - (3) *Necessary ambulance, hospital, professional nursing and funeral services.*

## 2. *Exclusions*

*We will not pay expenses for “bodily injury”:*

\* \* \*

*f. Products-Completed Operations Hazard*

*Included within the “products-completed operations hazard.”*

**g. Coverage A Exclusions**

*Excluded under Coverage A.*

## ***SECTION II – WHO IS AN INSURED***

**1. If you are designated in the Declarations as:**

a. An individual, you and your spouse are insured, but only with respect to the conduct of a business of which you are the sole owner.

- b. *A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.*
  - c. *A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.*
  - d. *An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.*
  - e. *A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.*

*No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.*

## *SECTION V—DEFINITIONS*

3. *"Bodily injury"* means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time

\* \* \*

13. *"Occurrence"* means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

\* \* \*

#### **16. "Products-completed operations hazard":**

- a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

  - (1) Products that are still in your physical possession; or
  - (2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:
    - (a) When all of the work called for in your contract has been completed.
    - (b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
    - (c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

*Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.*

- b.** Does not include "bodily injury" or "property damage" arising out of:

  - (1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured;
  - (2) The existence of tools, uninstalled equipment or abandoned or unused materials; or

(3) Products or operations for which the classification, listed in the Declarations or in a policy schedule, states that products-completed operations are subject to the General Aggregate Limit.

\* \* \*

#### **21. "Your product":**

*a.* *Means:*

- (1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

  - (a) You;
  - (b) Others trading under your name; or
  - (c) A person or organization whose business or assets you have acquired; and

(2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

*b.* Includes

- (1) *Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and*
  - (2) *The providing of or failure to provide warnings or instructions*

c. Does not include vending machines or other property rented to or located for the use of others but not sold.

## 22. "Your work":

*a.* *Means:*

- (1) Work or operations performed by you or on your behalf; and
  - (2) Materials, parts or equipment furnished in connection with such work or operations.

**b.** *Includes*

- 1                   (1) *Warranties or representations made at any time  
2 with respect to the fitness, quality, durability,  
3 performance or use of "your work", and  
4*
- (2) *The providing of or failure to provide warnings or  
instructions.*

      \* \* \*

5 The policy includes Endorsements with the following language:

6                   ***EXCLUSION –  
7 PRODUCTS-COMPLETED OPERATIONS HAZARD***

8                   *This endorsement modifies insurance provided under the following:*

9                   ***COMMERCIAL GENERAL LIABILITY COVERAGE PART.***

10                  *This insurance does not apply to "bodily injury" or "property  
11 damage" included within the "products-completed operations  
hazard".*

12                  ***CG-2104 11/85***

13                  \* \* \*

14                  ***INSURING AGREEMENT AMENDMENT -  
USE OF EXTRINSIC EVIDENCE -  
RIGHT TO DEFEND***

15                  ***THIS ENDORSEMENT MODIFIES INSURANCE PROVIDED  
16 UNDER THE FOLLOWING:***

17                  ***COMMERCIAL GENERAL LIABILITY COVERAGE PART***

18                  A. *Paragraph 1. a. of SECTION I – COVERAGES, COVERAGE  
A BODILY INJURY AND PROPERTY DAMAGE  
LIABILITY is replaced by the following:*

19                  a. *We will pay those sums that the insured becomes legally  
20 obligated to pay as damages because of "bodily injury"  
or "property damage" to which this insurance applies.  
21 We will have the right and duty to defend the insured  
against any "suit" seeking covered damages. We will  
have the right, but not the duty to defend or indemnify the  
22 insured against any "suit" seeking damages for "bodily  
23*

*injury*" or "*property damage*" to which this insurance does not apply.

*We may look to extrinsic evidence outside of the allegations and/or facts pleaded by any claimant to determine whether we owe a duty to defend or indemnify against a lawsuit seeking "bodily injury" or "property damage," provided that extrinsic evidence does not contradict a claimant's pleaded allegations and provided that evidence relates to a discrete coverage issue under the policy and not a merits or liability issue. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:*

- (1) *The amount we will pay for damages is limited as described in Section III - LIMITS OF INSURANCE; and*
  - (2) *Our right and duty to defend a claim to which this insurance applies ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under COVERAGE A or B or medical expenses under COVERAGE C.*

*Paragraphs b. (3), c. and d. under Paragraph 1. Insuring Agreement of SECTION I – COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY are deleted.*

*No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under **SUPPLEMENTARY PAYMENTS – COVERAGES A and B.***

六

*ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED*

AGL-077 3/13

### Count I – Coverage A

3.3 Based on the terms of Atlantic policy no. M179000250, Atlantic has no duty to defend and no duty to indemnify Lilac City Vapor, LLC or Brad Bellinger dba Lilac City Vapor under Coverage A of the policy against the claims made by defendant Marlene Rubertt in the liability lawsuit for one or more of the following reasons:

a. Pursuant to endorsement CG-2104 11/85, the insurance does not apply to "*bodily injury*" or "*property damage*" included within the "*products completed operations hazard*." The "*products completed operations hazard*" is defined in the policy to include all "*bodily injury*" occurring away from premises you own or rent and arising out of "*your product*." "*Your product*" is defined in the policy to include all goods and products sold, handled, distributed or disposed of by you, including warranties or representations, as well as the providing of or failure to provide warnings or instructions. The e-cigarette products that defendants Lilac City Vapor, LLC or Brad Bellinger dba Lilac City Vapor sold to defendant Marlene Rubertt meet the policy definition of "*your product*," and Ms. Rubertt's "*bodily injury*" arose of those products and occurred away from premises the insured owned or rented. Accordingly, the "*products completed operations hazard*" exclusion set forth in the endorsement eliminates coverage.

COMPLAINT FOR DECLARATORY RELIEF – 12  
USDC ED WA CAUSE NO.

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b. The named insured identified in the policy's declarations is "Brad Bellinger dba Lilac City Vapor," which is designated as an individual. Lilac City Vapor, LLC is not named as an insured on the policy. The Who Is An Insured provision provides that no person is an insured with respect to the conduct of any limited liability company that is not shown as a Named Insured in the Declarations. Accordingly, Lilac City Vapor, LLC does not qualify as an insured under the policy.

c. There is no Medical Payments coverage for any expenses for “*bodily injury*” excluded under Coverage A. In addition, Medical Payments coverage does not apply to “*bodily injury*” that is included within the “*products-completed operations hazard*.”

## Count II – Coverage C

3.3 Based on the terms of Atlantic policy no. M179000250, Coverage C does not apply to the claims made by defendant Marlene Rubert in the liability lawsuit for one or more of the following reasons:

a. Pursuant to exclusion f, Coverage C does not apply to "*bodily injury*" included within the "*products completed operations hazard*." The "*products completed operations hazard*" is defined in the policy to include all "*bodily injury*" occurring away from premises you own or rent and arising out of "*your product*." "*Your product*" is defined in the policy to include all goods and

1 products sold, handled, distributed or disposed of by you, including warranties or  
 2 representations, as well as the providing of or failure to provide warnings or  
 3 instructions. The e-cigarette products that defendants Lilac City Vapor, LLC or  
 4 Brad Bellinger dba Lilac City Vapor sold to defendant Marlene Rubertt meet the  
 5 policy definition of "*your product*," and Ms. Rubertt's "*bodily injury*" arose of  
 6 those products and occurred away from premises the insured owned or rented.  
 7 Accordingly, the "*products completed operations hazard*" exclusion f. eliminates  
 8 coverage.

10           b. Pursuant to exclusion g, Coverage C does not apply to "*bodily*  
 11 *injury*" excluded under Coverage A. For the reasons alleged in Count I, Coverage  
 12 A is inapplicable. Accordingly, exclusion g likewise eliminates coverage under  
 13 Coverage C.

15           c. The named insured identified in the policy's declarations is  
 16 "Brad Bellinger dba Lilac City Vapor," which is designated as an individual.  
 17 Lilac City Vapor, LLC is not named as an insured on the policy. The Who Is An  
 18 Insured provision provides that no person is an insured with respect to the  
 19 conduct of any limited liability company that is not shown as a Named Insured in  
 20 the Declarations. Accordingly, Lilac City Vapor, LLC does not qualify as an  
 21 insured under the policy.

23  
 COMPLAINT FOR DECLARATORY RELIEF – 14  
 USDC ED WA CAUSE NO.

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1  
2                   **IV. REQUEST FOR RELIEF**  
3  
4

5                   WHEREFORE, plaintiff Atlantic Casualty Insurance Company prays for  
6 the following relief:  
7  
8

9                   A. For a declaratory judgment in its favor stating that:  
10  
11                         (ii) policy no. M179000250 provides no coverage to defendants  
12 Lilac City Vapor, LLC or Brad Bellinger dba Lilac City Vapor for the claims  
13 made by defendant Marlene Rubertt in the liability lawsuit;  
14  
15                         (iii) Atlantic has no duty to defend Lilac City Vapor, LLC or Brad  
16 Bellinger dba Lilac City Vapor policy no. M179000250 against the claims made  
17 by Marlene Rubertt in the liability lawsuit;  
18  
19                         (iv) Atlantic may withdraw from the defense it is currently  
20 providing to Lilac City Vapor, LLC for the claims made against it by defendant  
21 Marlene Rubertt in the liability lawsuit;  
22  
23                         (v) Atlantic has no duty to indemnify Lilac City Vapor, LLC or  
24 Brad Bellinger dba Lilac City Vapor in connection with any settlement with or  
25 judgment in favor of defendant Marlene Rubertt in the liability lawsuit.

26                   B. For costs and attorney's fees to the extent permitted by law; and  
27  
28                   C. For such other and further relief as this court may deem just and  
29 equitable.  
30

1  
2  
3 DATED this 1st day of December, 2016.  
4  
5

6 SOHA & LANG, P.S.  
7  
8

9 By: /s/ Mary DeYoung  
10  
11

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18 Attorneys for Plaintiff Atlantic Casualty  
19 Insurance Company  
20  
21  
22  
23

COMPLAINT FOR DECLARATORY RELIEF – 16  
USDC ED WA CAUSE NO.

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**EXHIBIT “A”**

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FILED

OCT 18 2016

TIMOTHY W. FITZGERALD  
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR SPOKANE COUNTY

MARLENE RUBERTT, an individual,

NO. 16203995-7

Plaintiff;

COMPLAINT FOR DAMAGES

v.

LILAC CITY VAPOR, LLC, a limited liability company organized under the laws of the State of Washington, and DOBS 1-100 inclusive.

Defendant.

PLAINTIFF ALLEGES AS FOLLOWS:

I. INTRODUCTION

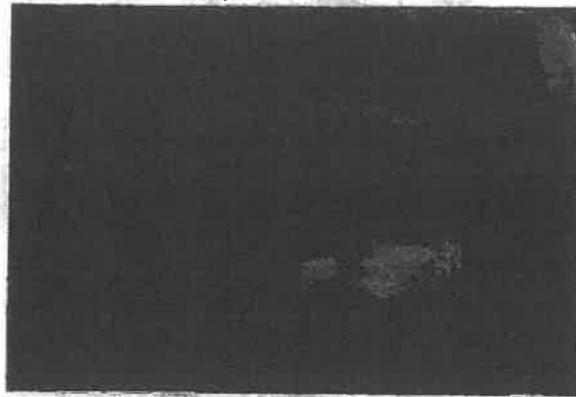
1. Plaintiff Marlene Rubertt ("Marlene") purchased an electronic cigarette and related parts. The defendants are the manufacturers, wholesalers, distributors, and retailers of the electronic cigarette and related parts. On January 30, 2016, Marlene was at home watching a Crimson Men's College basketball game. As Marlene brought the electronic cigarette to her mouth to take a hit from the device, the electronic cigarette suddenly exploded in her face. As a

COMPLAINT FOR DAMAGES - 1

LAW OFFICES OF JAMES S. ROGERS  
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1 result of the explosion, Marlene suffered severe, traumatic injuries to her mouth and face, along  
2 with burns to her neck, chest, face, and the roof of her mouth.



10 2. Electronic cigarettes, or e-cigarettes<sup>1</sup> as they are more commonly known, claim to  
11 provide a tobacco-free alternative to the traditional cigarette. E-cigarettes offer doses of nicotine  
12 in a vaporized solution which gives users a physical sensation similar to smoking tobacco,  
13 supposedly without the harmful effects. E-cigarettes also offer non-nicotine flavors in enticing  
14 varieties, such as gummy bear, vanilla, and blueberry-pancake. Using e-cigarettes is known as  
15 "vaping," and users are known as "vapers." In addition to the e-cigarette products that Marlene  
16 purchased and used, Defendants manufacture, design, and sell a variety of other e-cigarette  
17 products across Washington.

18 3. All e-cigarettes function basically the same way. They consist of three parts: (1) a  
19 tank or cartridge ("cartridge"); (2) a battery, which heats the liquid nicotine and other chemicals  
20 (often called "juices" or "e-liquids") that are held within the cartridge; and (3) an atomizer,  
21 which converts the e-liquid to vapor that the user then inhales. Some e-cigarettes use closed-  
22 system cartridges—cartridges that are pre-filled with e-liquid by the manufacturer before

23  
24 <sup>1</sup>These products are also referred to as electronic nicotine delivery systems (ENDS), personal vaporizers (PVs),  
electronic smoking devices, vapor products, and alternative nicotine delivery devices, among others.

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1 purchase. Others use open system cartridges—cartridges that are manually refilled with e-liquid  
 2 by the user after purchase. The batteries used in e-cigarettes are cylindrical lithium-ion batteries.  
 3 Some batteries are rechargeable, and others are disposable. Finally, e-cigarettes are produced in  
 4 two forms (modeled after the traditional cigarette) and in mod form (mechanical or electrical)  
 5 devices that are heavier and carry a much higher capacity for juice and power.

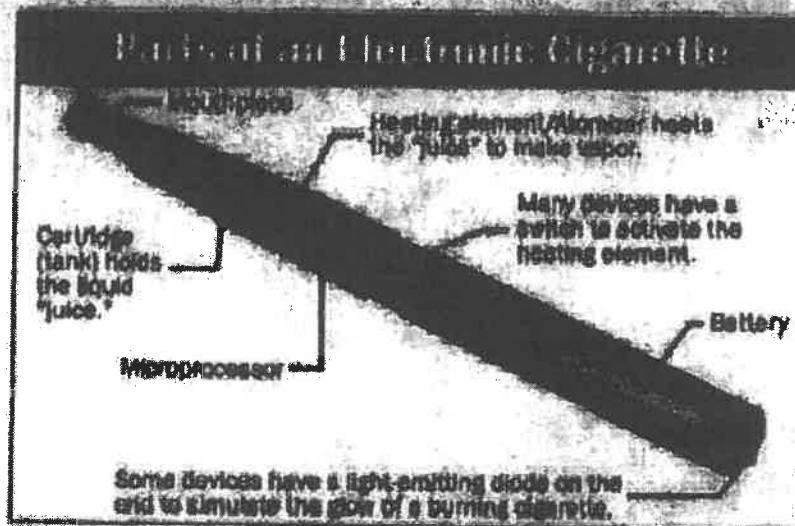


Diagram Courtesy of Philip Morris International, Patent Examination Application, U.S. Patent & Trademark Office, Dec. 2012. [www.uspto.gov](http://www.uspto.gov)

16       4. The lack of legislative and judicial oversight in the e-cigarette industry has created  
 17 serious risks for consumers who buy e-cigarettes as a safer alternative to traditional cigarettes;  
 18 these products do not include adequate instructions, proper warnings, or compatible components.  
 19 Marlene's excruciating pain, burns, and damage to her teeth are the result of Defendants' failure  
 20 to make their products safe before introducing them into the market for use.

## II. THE PARTIES

22       5. Plaintiff Marlene Robert, an individual, is and at all relevant times was, a resident  
 23 of the State of Washington, County of Spokane, City of Spokane.

24  
**COMPLAINT FOR DAMAGES -3-**

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 Seattle, WA 98101  
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1       6. Plaintiff alleges that defendant, Lilac City Vapor, LLC ("Lilac City Vapor"), is  
2 and at all relevant times mentioned herein was, a company licensed to conduct business or  
3 conducting business in Washington, through its agents and/or employees, and is the alter ego  
4 and/or joint venture of other corporations, entities, and business interests, each of which is  
5 conducting business in the State of Washington, County of Spokane, City of Spokane. Defendant  
6 Lilac City Vapor sells e-cigarette products, including the products purchased and used by  
7 Marlene that are the subject of this lawsuit.

8       7. Plaintiff further alleges that Lilac City Vapor has a place of business located in the  
9 State of Washington, County of Spokane, City of Spokane. Specifically, it is located at 2602 N.  
10 Hamilton St., Spokane, Washington 99207.

11       8. The true names and capacities, whether individual, corporate, associate or  
12 otherwise, of Defendants Does 1-100, inclusive, and each of them, are unknown to Plaintiff, who  
13 hereby sues these Defendants by such fictitious names, and will ask leave of this court to amend  
14 this complaint when the true names are ascertained.

15       9. Plaintiff is informed and believes and on that basis alleges that each Defendant  
16 named herein as a Doe is responsible in some manner for the events and happenings referred to  
17 herein which proximately caused injury to Plaintiff as hereinafter alleged.

18       10. Plaintiff is informed and believes and on that basis alleges that at all times  
19 mentioned herein the Defendants, and each of them, were the agents, servants, employees, and  
20 joint ventures of each other, and were as such acting within the scope, scope and authority of  
21 said agency and employment and/or joint venture, and that each and every Defendant, when  
22 acting as a principal, was negligent and reckless in the selection, hiring, recruitment and  
23 supervision of each and every other Defendant as an agent, servant, employee, or joint venture.

24  
**COMPLAINT FOR DAMAGES - 4**

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**III. JURISDICTION & VENUE**

11. The Superior Court of Spokane County, State of Washington, has subject matter  
 jurisdiction over this action pursuant to RCW 2.44.010.

12. Venue is proper in Spokane County, Washington pursuant to RCW 4.12.025  
 because Defendant Ulike City Vapor sells and transacts business in Spokane County,  
 Washington.

**IV. FACTUAL BACKGROUND****A. Background of e-cigarettes**

13. The explosion of Marlene's e-cigarette product which caused burns and traumatic  
 injuries to Marlene is not a novel occurrence. There is mounting evidence that the explosions and  
 fires caused by e-cigarettes are increasing and have injured many consumers.<sup>2</sup>

14. E-cigarettes differ from traditional cigarettes in a critical way: the e-cigarette is  
 battery-operated and uses a heating element to produce vapor, and the traditional cigarette has no  
 electronic component. While both products may produce a similar physical sensation, e-  
 cigarettes pose an additional danger—the battery-powered heating element can cause, and has  
 caused, explosions, fires, and serious injury. Lithium-ion batteries, commonly used in all types  
 of e-cigarettes, have an inherent risk of fire and explosion.<sup>3</sup> Combining lithium-ion batteries with  
 a heating element, as done in e-cigarettes, poses serious dangers and risks.

15. E-cigarettes are more dangerous than other products that contain lithium batteries  
 because the e-cigarette is more often a cylindrical device. There are different methods to protect  
 against those batteries. In the absence of a lack of regulation, the protections are left up to the e-

<sup>2</sup> Washington, Wash., Mayor Prohibits E-Cigarettes & Chargers Batteries to Explode! NBC News. Mar. 8, 2016.

<sup>3</sup> See, e.g., U.S. Chemical Safety and Hazard Investigation Board, Report on the Lithium-Ion Battery Fire and Explosion of a Samsung Galaxy Note 7 Smart Phone, at 13, available at [www.cshb.gov/reports/note7.pdf](http://www.cshb.gov/reports/note7.pdf).

**COMPLAINT FOR DAMAGES - 1**

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1 operate manufacturers. (Id. at 5.)

2       16. The inherent danger of lithium-ion batteries lies in the "poor design, use of low-  
 3 quality materials, manufacturing flaws and defects, and improper use and handling [which] can  
 4 all contribute to a condition known as 'thermal runaway', whereby the internal battery  
 5 temperature can increase to the point of causing a battery fire or explosion." (See, e.g., Brown  
 6 CM, Cheng JM, *Electronic Cigarette Product Characterization and Design Considerations*,  
 7 *Tobacco Control*, 2014.) The medical case report noted that as the industry grows, "the potential  
 8 for serious burn injuries related to device malfunction is of concern." (*Spontaneous Electronic*  
 9 *Cigarette Explosion: A Case Report*, *American Journal of Medical Case Reports*, 2015, Vol. 3,  
 10 No. 4, 93-94, 94.)

11       17. The e-cigarette industry carries more appeal to manufacturers, distributors, and  
 12 sellers because the cost of production is low and the return on profits is high. Currently,  
 13 manufacturers, distributors, and sellers are not required to spend any money on testing or to  
 14 otherwise ensure the safety of e-cigarette products. Most United States' distributors choose to  
 15 import e-cigarettes from China because of the low cost and non-existent quality control.

16       18. E-cigarettes continue to be placed into the stream of commerce without any  
 17 federal regulatory, manufacturing, and quality control standards. Proposed federal regulations  
 18 only address the *device* aspect of e-cigarettes, but completely fail to address the *manufacturing*  
 19 and *quality control* aspects of these products. As was noted in October 2014 and is the case  
 20 now, "no regulation, rule, or law applies to the safety of the electronics or batteries in e-  
 21 cigarettes. While many consumer products are required to be tested by a nationally recognized  
 22 test laboratory...there are no requirements that e-cigarettes be subjected to product safety

23  
 24 \*Lithium-ion batteries have been referred to as the "match bomb in your pocket" due to its known ability to spontaneously ignite (See, Ben D., Ma B., Lin L., et al, *Unusual Burns with Combined Injury Caused by Mobile*

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1 testing." (United States Fire Administration, *Electronic Cigarette Fires and Explosions*, October  
2 2014, at 2. (emphasis added).)

3 19. These e-cigarette products, such as what was purchased and used by Marlene,  
4 continue to be placed into the stream of commerce despite being untested and unsafe. E-  
5 cigarettes will continue to cause injuries from explosions and fire as suffered by Marlene unless  
6 and until those placing them in the stream of commerce are held accountable.

7 B. The explosion that changed Marlene's life

8 20. Marlene is grew up in Spokane, Washington. For the last twenty-four years she  
9 has worked as a Dental Claims Analyst for Guardian Life Insurance.

10 21. Approximately six years ago, Marlene started vaping because she believed vaping  
11 was a cleaner and healthier alternative to traditional cigarettes. She purchased various e-cigarette  
12 products from Lilac City Vapor over the course of the four years prior to the explosion.

13 22. On or around December 11, 2015, Marlene purchased an Efest battery stamped  
14 IMR 18650 3.7V 3000mAh ("Efest Battery") from Lilac City Vapor in Spokane, Washington.  
15 Marlene was a loyal customer, also purchasing the following items on different dates from Lilac  
16 City Vapor: a Tobacco Mod, a TrustFire charger, and an Arctic atomizer.

17 23. Marlene's e-cigarette products consisting of an Efest battery, Tobacco Mod,  
18 TrustFire charger, and Arctic atomizer (collectively, the "E-Cig Products") were manufactured,  
19 who leased, distributed, and retained by Defendants and Does 1-100.

20 24. On January 30, 2016, Marlene was watching a Gonzaga men's basketball game at  
21 home. As she brought the e-cig to her mouth to inhale from the device, it suddenly exploded in  
22 her mouth and face.

23 25. Immediately following the explosion blood was pouring out of Marlene's mouth.

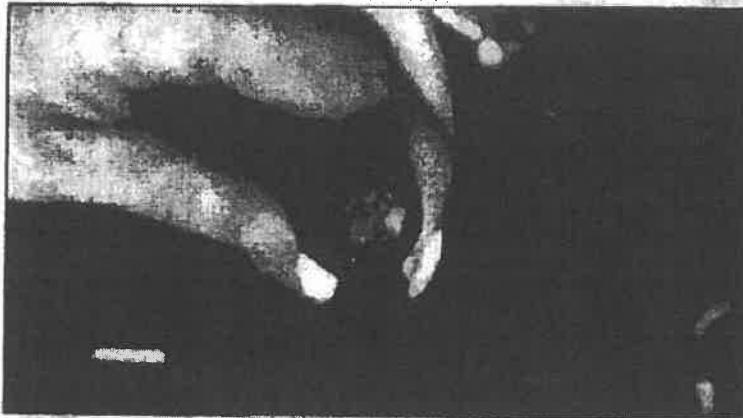
24 Photo Explosion: Watch Out for the "Mad Monk" (1 Photo, Date: 2009 Nov 01, 10:48)

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1 Many of her teeth were on the floor, and some of her teeth had lodged into the e-cig product. The  
2 roof of Marlene's mouth was burnt, and Marlene also had burns inside her nose, on her face, and  
3 on her neck and chest.



11       26. Marlene was driven to the emergency room at Holy Family Hospital in Spokane,  
12 Washington. At the emergency room, Marlene was given an IV and pain medication.

13       27. After she was discharged from the hospital, Marlene continued to receive  
14 treatment and care from David Gailey, DDS for her injuries. Marlene had seven different  
15 appointments with Dr. Gailey from February 2, 2016 through April 12, 2016. Over the course of  
16 those appointments, Marlene had a maxillary bone reconstruction with block bone graft to create  
17 structure in her jaw. The bone graft required using bone both from Marlene's lower jaw and from  
18 a cadaver. Marlene also had a sinus lift and three surgical extractions of roots and broken teeth.  
19 Dr. Gailey surgically removed pieces of e-cig plastic from Marlene's upper lip. In early-August,  
20 Marlene had x-rays to determine whether the jaw bones healed appropriately. Unfortunately, they  
21 did not. Marlene has been advised that she will require additional surgical procedures. Marlene  
22 fears these additional painful surgical procedures but understands they are required for her to  
23 injuries to improve.

24  
COMPLAINT FOR DAMAGES - 8

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- 1       28. In the days and weeks following the explosion, Marlene had difficulty eating,  
2 drinking, and speaking. She was put on a no solids diet for six weeks following her first surgery.  
3 For about three months following the explosion, Marlene avoided all social settings.  
4       29. Marlene continues to struggle with the physical and emotional injuries she  
5 sustained in the explosion.  
6       30. The fire and Marlene's resulting injuries were caused by the defective E-Cig  
7 Products as well as Defendants' negligence.

8                          **V. FIRST CAUSE OF ACTION**  
9                          (~~Product Liability~~)

- 10      31. Plaintiff refers to each and every preceding paragraph and incorporates those  
11 paragraphs as though set forth in full in this cause of action.  
12      32. At all times mentioned herein, Defendant Lilac City Vapor and Does 1-100,  
13 inclusive, were engaged in the business of manufacturing, fabricating, designing, assembling,  
14 distributing, selling, inspecting, warranting, leasing, renting, retailing, wholesaling, and  
15 advertising the E-Cig Products that Marlene purchased and used.  
16      33. On January 30, 2016, as Marlene was using the E-Cig Products in a reasonably  
17 foreseeable and intended manner, the Best Battery suddenly exploded in Marlene's face and  
18 caused severe and painful injuries to Marlene's mouth, which includes the loss of three teeth, a  
19 bone graft, a sinus lift, and three surgical extractions of roots and broken teeth.  
20      34. In violation of the Washington Product Liability Act, RCW 7.72, et seq., at the  
21 time the E-Cig Products left control of the manufacturer, they were defective and not reasonably  
22 safe for purposes that include, but are not limited to, the following:  
23                         a. The E-Cig Products were not reasonably safe in their design, resulting in  
24 excessive overheating of the E-Cig Products, causing them to catch fire in the

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- 1                  ~~course of intended use and in the course of non-use;~~
- 2        b. The E-Cig Products were unsafe to an extent beyond that which would be  
3                  contemplated by an ordinary user;
- 4        c. At the time of manufacture, the likelihood that the E-Cig Products would cause  
5                  injury or damage similar to that suffered by Martens, and the seriousness of such  
6                  injury or damage, outweighed the burden on the manufacturer to design a product  
7                  that would have prevented Martens' injuries and outweighed the adverse effect  
8                  that an alternative design that was practical and feasible would have on the  
9                  usefulness of the E-Cig Products;
- 10      d. The E-Cig Products were not reasonably safe because adequate warnings or  
11                 instructions were not provided with the E-Cig Products about the risks, dangers,  
12                 and harm presented by the E-Cig Products. Nowhere does the product or  
13                 packaging warn of risk of explosion. There were simply no warnings about the  
14                 hazards inherent in the E-Cig Products;
- 15      e. The E-Cig Products were not reasonably safe and defendants were negligent  
16                 because adequate warnings or instructions were not provided after they were  
17                 manufactured; and
- 18      f. The likelihood that the E-Cig Products would cause injuries similar to those of  
19                 Martens and the seriousness of those injuries rendered the warnings or  
20                 instructions of the manufacturer inadequate, and the manufacturer could have  
21                 provided adequate warnings or instructions.
- 22      35. Defendants and Does 1-100, inclusive, are strictly liable because the E-Cig  
23                 Products did not conform to Defendants' express or implied warranties.  
24

COMPLAINT FOR DAMAGES - 10

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1 15. Defendant and Done 1-100, inclusive, are strictly liable because the E-Cig  
2 products materially deviated from the design specifications or performance standards of the  
3 manufacturer, and materially deviated from otherwise identical units of the same product line, to  
4 an extent beyond that which would be contemplated by the ordinary consumer.

5           37. Does S1-100's, inclusive, conduct described herein was undertaken by its officers  
6 or managing agents, who were responsible for the design, manufacture, marketing, wholesaling,  
7 retailing, distributing, packaging, and warnings regarding use of the E-Cig Products. The  
8 aforementioned conduct of said managing agents and individuals was therefore undertaken on  
9 behalf of Dow S1-100, inclusive. Said Does S1-100, inclusive, further had advance knowledge of  
10 the actions and conduct of these individuals whose actions and conduct were ratified, authorized,  
11 and approved by managing agents.

## **VI. SECOND CAUSE OF ACTION (Negligence)**

38. Plaintiff refers to each and every preceding paragraph and incorporates those paragraphs as though set forth in full hereto.

39. As a seller of goods to the public, Defendants had a duty to use reasonable care in  
16 providing information and warnings to the users of the E-Cig Products regarding dangers  
17 associated with the use of the E-Cig Products of which Defendants were aware, or should have  
18 been aware, in the exercise of reasonable care.

40. Defendants had a duty to use reasonable care to provide products which would be safe when used.

41. Defendants knew, or should have known, of the dangers of using the B-Cig  
22 Products. Despite such knowledge, Defendants failed to use due care to warn of the dangers of  
23 the B-Cig Products.

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42. Defendants knew or should have known that its products would be purchased and  
43. used by consumers who expected the products to be safe.

44. Defendants were negligent in failing to provide adequate warnings and  
45. instructions to users of the dangers associated with the use of the Re-Cyc Products.

46. Defendants were negligent in providing the Re-Cyc Products to consumers. In the  
47. exercise of reasonable care, defendants knew or should have known of the risk of danger to  
48. consumers.

## VII. PROXIMATE CAUSE & DAMAGES

49. Plaintiff refers to each and every preceding paragraph and incorporates those  
50. paragraphs as though set forth in full herein.

51. 52. As a direct and proximate result of the tortious conduct of Defendant and Does 1-  
53. 100, inclusive, as set forth above, Marlene sustained serious, ongoing, permanent injuries.

54. 55. As a further direct and proximate result of the conduct of the defendants as set  
56. forth above, the injuries sustained by Marlene are painful, permanent, and disabling, and have  
57. necessitated extensive medical and dental care in the past and will continue to require such care  
58. in the future.

59. 60. As a further direct and proximate result of her injuries, Marlene has sustained  
61. medical and dental expenses, lost earnings, and out of pocket costs and expenses. With  
62. reasonable probability, Marlene will continue to sustain medical and dental expenses, life care  
63. costs and expenses, and other out of pocket costs and expenses in the future as a result of her  
64. ongoing injuries.

65. 66. As a further direct and proximate result of her injuries, Marlene has suffered pain  
67. and suffering, loss of enjoyment of life, disability and disfigurement and with reasonable  
68.

COMPLAINT FOR DAMAGES - 12

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1 probability will continue to suffer pain and suffering, loss of enjoyment of life, disability and  
2 disfigurement in the future.

3 30. As a further direct and proximate result of her injuries, Plaintiff has suffered  
4 impairment of earning capacity and loss of future earnings.

5 **THE PRAYER**

6 Wherefore, Plaintiff Marlene Rubert, prays for judgment against the Defendants, jointly  
7 and severally, including:

- 8 1. General damages, including pain and suffering, in an amount to be determined at  
9 the time of trial;
- 10 2. Special damages including, but not limited to, damages for past and future  
11 medical and dental care; lost earnings and loss earning capacity in an amount to be  
12 determined at the time of trial;
- 13 3. Property damage according to proof;
- 14 4. Prejudgment interest according to proof;
- 15 5. Costs of suit; and
- 16 6. Such other and further relief as the Court deems proper.

17 DATED this 12<sup>th</sup> day of October, 2016.

18 **LAW OFFICES OF JAMES S. ROGERS**

19 by:   
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SUPERIOR COURT OF WASHINGTON FOR Spokane COUNTY

Marlene Huber Plaintiff/Petitioner  
vs

Lilac City Vapor  
LLC Defendant/Respondent

No. **16203995-7**DECLARATION OF  
EMAILLED DOCUMENT  
(DCLR)

Pursuant to the provisions of GR 17, I declare as follows:

1. I am the party who received the foregoing facsimile transmission for filing.
2. My address is: 304 W Spruce CT, Spokane, WA 99218
3. My phone number is (509) 262-8106
4. The e-mail address where I received the document is: Sgobble@abclegal.com
5. I have examined the foregoing document, determined that it consists of \_\_\_\_\_ pages, including this Declaration page, and that it is complete and legible.

I certify under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated: 10/13/16, at, 4:05pmSignature: Print Name: Skyler Gobble